

for Roanoke
MAY 23 2012* JULIA C. DUDLEY, CLERK
BY: *[Signature]*
DEPUTY CLERKIN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CURTIS L. MCCOY,

Plaintiff,

v.

WARDEN S. K. YOUNG, et al.,

Defendants.

Civil Action No. 7:12-cv-00192

MEMORANDUM OPINIONBy: Hon. Jackson L. Kiser
Senior United States District Judge

Curtis L. McCoy, a Virginia inmate proceeding pro se, filed a civil rights complaint, pursuant to 42 U.S.C. § 1983 with jurisdiction vested in 28 U.S.C. § 1343. Plaintiff names as defendants: S.K. Young, Warden of the Pocahontas Correctional Center ("PCC"); Bandy, a Hearing Officer; Yates, the PCC Medical Administrator; A. Mitchell, a Nurse at PCC; Peggy Scarberry, a Nurse at PCC; R. Thomas, a Postal Assistant; Cartwright, an Investigator; Mr. Hammond, a Treatment Programs Supervisor ("TPS"); and PCC correctional officers ("C/O") Captain Wick, Lieutenant Buckannon, J. W. Cumbee, Craig, Johnson, and Anderson.¹ Plaintiff alleges that Cumbee used excessive force on July 23, 2011, and Yates, Mitchell, and Scarberry were deliberately indifferent to serious medical needs, in violation of the Eighth Amendment of the United States Constitution. Plaintiff alleges that Young, Craig, Wick, Buckannon, Cartwright, and Johnson failed to protect plaintiff and covered up the unconstitutional force, in violation of the Eighth and Fourteenth Amendments. Plaintiff also alleges that Craig's conduct during a body cavity search violated the Fourth Amendment.

Plaintiff filed the action in July 2011 with the United States District Court for the Eastern District of Virginia ("District Court"), and the District Court granted plaintiff leave to proceed in

¹ Plaintiff originally named Scarberry as "Strawberry," but a court order corrected the name. Counsel for the Correctional Defendants also noted that Buckannon should be Buchanan, Thomas should be Thomason, and Johnson should be M. Johnson. Despite this information, plaintiff did not request a change to the names, and I decline to modify the defendants' identities without additional evidence or plaintiff's request.

forma pauperis, pursuant to 28 U.S.C. § 1915(b), in October 2011. On December 22, 2011, the District Court informed plaintiff that he is responsible for serving the complaint on the defendants within 120 days, pursuant to Fed. R. Civ. P. 4(m), but directed the Clerk to notify the Office of the Attorney General of Virginia of the action, pursuant to an informal agreement between the District Court and that Office.

All but one defendant, Anderson, responded after the Clerk notified the Attorney General of Virginia. The Correctional Defendants – Young, Bandy, Thomas, Cartwright, Hammond, and Correctional Officers Capt. Wick, Lt. Buckannon, Johnson, Cumbee, and Craig – answered the complaint and filed a motion for summary judgment on January 26, 2012,² to which plaintiff filed a cross motion for summary judgment on February 13, 2012. The Medical Defendants – Yates, Mitchell, and Scarberry – filed a motion to dismiss and a motion for summary judgment on March 2, 2012.³ Plaintiff did not file a response to the Medical Defendants’ motions.

On March 20, 2012, the District Court noted that plaintiff had not yet served Anderson and reminded plaintiff that it was his duty to complete service of process or provide the Attorney General with enough information to identify Anderson in the time required by Rule 4(m). The District Court transferred this action to me on April 23, 2012, because all events transpired and all defendants reside within the Western District of Virginia. The time for plaintiff to identify and serve Anderson and to respond to the Medical Defendants’ motions have expired, making this matter ripe for disposition. After reviewing the record, I dismiss the claims against Boyd

² The Correctional Defendants sent plaintiff a Roseboro notice on the same day. See Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975); E.D. Va. Local Civil Rule 7(K).

³ These motions were originally filed at docket entry 24 but are now duplicated in docket entries 24 and 26. The Medical Defendants’ Roseboro notice is located in a section at the end of the motions titled, “Notice.”

and Anderson without prejudice, grant the Correctional and Medical Defendants' motions to dismiss and for summary judgment, and deny plaintiff's motion for summary judgment.

I.

Plaintiff alleges the following facts in the verified complaint. On the morning of July 23, 2011, plaintiff was in a PCC pod and noticed that uncovered cups of milk were on a table underneath a dusty air duct. When plaintiff received a food tray an hour later, plaintiff told three correctional officers in the pod that the uncovered, unrefrigerated milk was a health hazard. Plaintiff asked the officers for an informal complaint and regular grievance form, and Cumbee replied, "I ain't gon[na] give you shit. Take the milk and go to your damn cell." Plaintiff told the officers he would not drink the milk, took a fruit juice box, and walked back to the cell while telling the officers he wanted to see a sergeant. Cumbee told plaintiff, "Shut your mouth and go to your damn cell." When plaintiff explained that he had a right to talk to a sergeant, Cumbee "became belligerent[,] screaming at [him] to put [the] food tray on the damn table." Plaintiff put the tray on the table and obeyed a second order to put his hands behind his back. Cumbee then "roughed up" plaintiff by tightening the handcuffs "as tight as they would go" and pushed plaintiff's arms "so far up [his] back [he] yelled, 'You trying to break my arm. . . . Break it, Break it.'"

Cumbee escorted plaintiff into an office and "full body slammed" plaintiff into a chair, "placing [a] forearm in [plaintiff's] throat, choking [plaintiff]." Plaintiff accused Cumbee of trying to kill plaintiff, and Cumbee said, "Ain't no cameras in here, nigger. Ya'll boys don't run shit. This is my pod," with a menacing look. Cumbee walked outside the office door to use a radio, and plaintiff wheeled the chair right behind Cumbee. Cumbee turned around, pushed plaintiff's chair "extremely hard" against the back wall, and said, "Boy, get your ass back in that

corner.” Cumbee said something to defendant Johnson, who stayed out in the hallway and then turned back toward plaintiff. Plaintiff alleges that:

For no apparent reason, [Cumbee] just snapped. He . . . snatched me up out [of] the chair by my t-shirt and slammed me face first into the floor. Part of my face was on the bottom of a stand up fan’s protruding leg. He then placed his over 200 pound weight on my head with his left knee. With his other knee, he kned me on my rib cage on the backside[, which caused a bruise]. He then began smacking me in my face, saying, “You heard me nigger. You heard what I told you, you hear me nigger.” I don’t know if Johnson was his look out, but he stayed in the hallway. Cameras will show his actions. He could have stopped the assault on me or at least attempted to. He did not protect me. As I laid there, I heard a rush of running feet. Then I knew someone was coming. At the time I did not know who yanked my legs in the air. He hel[d] both legs in one arm and applied the leg irons on so tight it [made a small cut and bruise above] my left heel. . . . I tried to plead to Captain Wick[, but] he did not respond. . . . The handcuffs cut[] into my skin. I was placed in the segregation shower with the Dog leash hooked at the top of the shower on the outside cage. This caused more pain. The nurse was brought in to see me. I refuse to be seen at the time. [Nurse Scarberry] and I have had problems . . . so she left. C/O Craig removed the handcuffs and leg irons. He stated those were his and that he shackled me. After he took the handcuffs off, my wrist were [sic] swollen and cut and the back of my heel. I ask again to see the nurse. She tried to charge me so I refused again. I felt I should not have had to pay for the officers’ actions. I then asked for informal complaint forms, emergency grievances, and request forms to see the magistrate. I ask that photos be taken. I was told there was no camera available by Sgt. Dye. I then filled out a request to have this done. . . . [but] I have not received a pink slip [copy of the informal complaint] yet. It’s been three working days.^[4]

(Compl. 9-11, 17-19.)

Although seemingly unrelated to Cumbee’s use of force, plaintiff alleges that defendant Craig humiliated plaintiff, in violation of the Fourth Amendment, for telling plaintiff to “place both hands on [his] cheeks (butt) and open up [his] asshole.” Plaintiff complains that Craig’s comments were not standard terminology and made plaintiff feel degraded and sexually

⁴ Plaintiff signed the complaint on July 29, 2011, six days after the alleged excessive force.

assaulted. Plaintiff filed an informal complaint about Craig's comment, but plaintiff believes that Craig removed the grievance from plaintiff's cell door.⁵

Plaintiff concludes that he has:

Been denied a magistrate to file charges on C/O Cumbee for assault, my right to file grievances in order to follow my due process has been denied [sic]. I was lacerated by handcuffs and leg irons. I have pain in my head, neck, back, ribs, and wrist/heel. I was denied my right to eat.^[6] They refuse to take pictures of injuries caused by C/O Cambee. C/O Johnson just watched the assault on me. There w[as] a whole pod of inmates I intend to call as witnesses that hear[d] me yell, "He's trying to kill me," and "Break my arm." I have stated my claims.

(Compl. 12.)

Plaintiff lists the claims against the defendants in their individual and official capacities as follows:

- Warden S.K. Young for his supervision of all other defendants;
- Officer Cumbee for excessive force and for assault and battery;
- Officer Craig for sexual harassment and for lacerating and scarring plaintiff's left heel with leg irons;
- Officer Johnson for watching C/O Cumbee assault plaintiff and not intervening;
- Hearings Officer Bandy for not being impartial and not viewing the video recording ;
- Medical Administrator Yates for having improperly trained staff and for interfering with a serious medical need;
- Nurse Mitchell for interfering with medical treatment and denying access to a doctor;
- Nurse Scarberry for refusing to treat plaintiff because plaintiff would not pay a co-pay;
- Capt. Wick for covering up the assault by refusing to allow any of his subordinate officers to take pictures;
- Lt. Buckannon for refusing to properly investigate the assault and for refusing to allow any of his subordinate officers to take pictures;
- Postal Assistant Thomas⁷ "for refusing to allow mail to go out, redirecting it back to [plaintiff] / holding [plaintiff's] outgoing mail to the magistrate up, holding [plaintiff's] letter to the Head of DOC, Mr. Harold Clark[e,] then re-routing it back to [plaintiff] in order to cover up C/O Cumbee's actions, interfering with attempts to mail certified mail previously approved, [and for] reading [plaintiff's] outgoing mail";

⁵ The record reveals that plaintiff received a response to this informal complaint after plaintiff filed this action.

⁶ Plaintiff simply alleges that Sgt. Dye, Officer Caldwell, and Officer Craig denied plaintiff the right to eat, but Dye and Caldwell are not defendants to this action.

⁷ The first time plaintiff identifies Thomas as a defendant or describes a claim against Thomas is at the end of the complaint where plaintiff lists the claims.

- C/O Anderson for “refusing [plaintiff] [his] due process right 35 times while in segregation [by] refusing [to give plaintiff] informal complaint forms on [July 29, 2011,] and 25 times on [July 28, 2011,] a total of 60 times”;
- Investigator Cartwright for failing to immediately investigate Cumbee’s actions;
- TPS Hammond for “interfering with [plaintiff’s] due process rights”; and
- Psychologist Boyd⁸ for refusing to give plaintiff psychological treatment after Cumbee’s alleged assault and for preventing plaintiff’s access to a doctor.

(Compl. 13-14.) Plaintiff requests \$400,000 in compensatory damages and \$350,000 in punitive damages.

II.

I must dismiss any action or claim filed by an inmate if I determine that the action or claim is frivolous or fails to state a claim on which relief may be granted. See 28 U.S.C. §§ 1915(e)(2), 1915A(b)(1); 42 U.S.C. § 1997e(c); Fed. R. Civ. P. 12(b)(6). The first standard includes claims based upon “an indisputably meritless legal theory,” “claims of infringement of a legal interest which clearly does not exist,” or claims where the “factual contentions are clearly baseless.” Neitzke v. Williams, 490 U.S. 319, 327 (1989). The second standard is the familiar standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), accepting a plaintiff’s factual allegations as true. A complaint needs “a short and plain statement of the claim showing that the pleader is entitled to relief” and sufficient “[f]actual allegations . . . to raise a right to relief above the speculative level. . . .” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). A plaintiff’s basis for relief “requires more than labels and conclusions. . . .” Id. Therefore, a plaintiff must “allege facts sufficient to state all the elements of [the] claim.” Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003).

⁸ Plaintiff lists Boyd as a defendant on the last page of the verified complaint, but Boyd has not been added to the docket and, consequently, has never been served. Accordingly, I join “Ms. Boyd, psychologist” as a defendant and will review the claim against her via 28 U.S.C. § 1915 and § 1915A.

Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). Thus, a court screening a complaint under Rule 12(b)(6) can identify pleadings that are not entitled to an assumption of truth because they consist of no more than labels and conclusions. Id. Although I liberally construe pro se complaints, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), I do not act as the inmate’s advocate, sua sponte developing statutory and constitutional claims the inmate failed to clearly raise on the face of the complaint. See Brock v. Carroll, 107 F.3d 241, 243 (4th Cir. 1997) (Luttig, J., concurring); Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985). See also Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978) (recognizing that a district court is not expected to assume the role of advocate for a pro se plaintiff).

A. Plaintiff fails to state a due process or access to courts claim against Anderson.

Plaintiff argues that Anderson violated due process, guaranteed by the Fourteenth Amendment, by not giving plaintiff an informal grievance form despite plaintiff’s sixty requests on July 28 and 29, 2011. Plaintiff’s PCC grievance record shows that plaintiff filed more than forty informal complaints between July and October 13, 2011, and plaintiff fails to explain how plaintiff was unable to receive an informal complaint form from other staff on July 28 or 29, 2011, or was prevented from filing an informal complaint after July 29, 2011. Regardless, it is well established in this circuit that there is no constitutional right to participate in grievance proceedings, and plaintiff’s due process claim fails as a matter of law. Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994).

The inability to file informal grievances does not violate plaintiff’s First Amendment right of access to courts. Inmates have a fundamental right to “adequate, effective, and

meaningful” access to courts. Bounds v. Smith, 430 U.S. 817, 822 (1977). To prove a violation of this right, an inmate must show an actual injury to the inmate’s effort to litigate an action. Strickler v. Waters, 989 F.2d 1375, 1383 (4th Cir. 1993). Plaintiff has not demonstrated how Anderson caused any specific harm to plaintiff’s ability to prosecute his claims. Moreover, plaintiff failed to exhaust administrative remedies, as discussed infra, by not filing any regular grievances or appealing a denied regular grievance, not because plaintiff could not file informal complaints on July 28 and 29, 2011. Because plaintiff has not demonstrated how Anderson caused any specific harm to litigation efforts, an access to courts claim against Anderson must also be dismissed without prejudice, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

B. Plaintiff fails to state a claim of deliberate indifference to a serious medical need.

A plaintiff must show that a defendant acted with deliberate indifference to a serious medical need to state a claim under the Eighth Amendment for the unconstitutional denial of medical assistance. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Deliberate indifference requires a state actor to have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. Farmer v. Brennan, 511 U.S. 825, 838 (1994). “Deliberate indifference may be demonstrated by either actual intent or reckless disregard.” Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990). See Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004) (“[T]he evidence must show that the official in question subjectively recognized that his actions were ‘inappropriate in light of that risk.’”). “A defendant acts recklessly by disregarding a substantial risk of danger that is either known to the defendant or which would be apparent to a reasonable person in the defendant’s position.” Miltier, 896 F.2d at 851-52. A health care provider may be deliberately indifferent when the

treatment provided is so grossly incompetent, inadequate, or excessive as to shock the conscience or is intolerable to fundamental fairness. Id. at 851. A medical need serious enough to give rise to a constitutional claim involves a condition that places the inmate at a substantial risk of serious harm, such as loss of life or permanent disability, or a condition for which lack of treatment perpetuates severe pain. Sosebee v. Murphy, 797 F.2d 179, 181-83 (4th Cir. 1986). A prisoner's disagreement with medical personnel over the course of treatment does not state a § 1983 claim. Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985); Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975) (per curiam).

1. Plaintiff fails to state a claim against Boyd.

Plaintiff simply alleges that Boyd “refus[ed] me psychological treatment after being brutally beaten by C/O Cumbee and refus[ed] to allow me to see Dr. Rooker.” (Compl. 14.) Plaintiff does not describe how Boyd was aware of, or recklessly disregarded, any serious medical need that warranted psychological treatment. See Bowring v. Godwin, 551 F.2d 44, 47-49 (4th Cir. 1977) (describing a serious medical need in the context of mental health services). Plaintiff's claim that Boyd would not allow plaintiff to see Dr. Rooker does not state a claim for an unconstitutional denial of medical care. Nurses were ready to treat plaintiff's injuries, but he refused medical care. The fact that plaintiff may prefer to have Boyd summon a doctor to diagnose or treat the injuries instead of nurses does not state an Eighth Amendment claim. Plaintiff's medical record shows that plaintiff was placed on the doctor's call list on August 1, 2011, and that plaintiff was prescribed antibiotic cream and naproxen on August 3, 2011. (Pl.'s Ex. 1 (no. 23-1).) Accordingly, plaintiff fails to sufficiently describe any serious medical need to warrant Boyd's services; how Boyd was deliberately indifferent to that serious medical need; how Boyd deliberately denied or interfered with a prison doctor's treatment; or how any delay

caused or aggravated any significant injury. Accordingly, plaintiff's claims against Boyd are dismissed without prejudice, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

2. Plaintiff fails to state a claim against the Medical Defendants.

Plaintiff similarly fails to state a claim against nurses Mitchell, Scarberry, and Yates.⁹ Plaintiff argues that the Medical Defendants were deliberately indifferent because Nurse Mitchell "interfer[ed] with the treatment of [his] wounds . . . and den[ied] plaintiff a doctor"; Nurse Scarberry denied plaintiff medical care because plaintiff refused to pay the co-pay; and Nurse Yates supervised improperly trained staff and "interfere[ed] with a serious medical need."¹⁰

Plaintiff's labels and conclusions about Mitchell's and Yates' "interference" are not sufficient to state a claim. Plaintiff refused treatment from Nurse Scarberry because plaintiff did not like Nurse Scarberry and because plaintiff did not want to pay the co-pay. Therefore, any lack of treatment was not a result of Nurse Scarberry's act or omission. It is not unconstitutional to require an inmate, who has available funds, to pay a co-pay to receive medical treatment.¹¹ See, e.g., City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245 n.7 (1983) ("Nothing we say here affects any right a hospital or government entity may have to recover from a detainee the cost of medical services provided to him."); Johnson v. Dep't of Pub. Safety & Corr.

⁹ Accordingly, the Medical Defendants are entitled to qualified immunity because plaintiff fails to describe how the Medical Defendants violated a constitutional or statutory right. See Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (stating qualified immunity involves a two-step inquiry: (a) whether the plaintiff's allegations state a claim that a defendant's conduct violated a constitutional or statutory right; and (b) whether that right was clearly established), overruled in part by Pearson v. Callahan, 555 U.S. 223 (2009) (permitting lower courts the discretion to determine which qualified immunity prong to analyze first).

¹⁰ Plaintiff does not allege that Yates trained or was responsible for training the other medical defendants.

¹¹ Plaintiff does not allege that medical treatment was denied because plaintiff did not have funds available to pay a co-pay.

Servs., 885 F. Supp. 817, 820 (D. Md. 1995) (finding that a co-pay policy does not represent intolerable treatment that shocks the conscience).

Plaintiff does not state a supervisory liability claim against Yates. To establish supervisory liability under § 1983, a plaintiff must show that: 1) the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to people like the plaintiff; (2) the supervisor’s response to that knowledge was so inadequate as to show “deliberate indifference to or tacit authorization of the alleged offensive practices”; and (3) that there was an “affirmative causal link” between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994). Plaintiff fails to describe a constitutional violation involving Mitchell and Scarberry and fails to describe how Yates knew that any subordinate’s conduct posed a pervasive and unreasonable risk of constitutional injury. Supervisory liability under § 1983 may not be predicated on the theory of respondeat superior. See Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 663 n.7 (1978); Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984).

III.

A party is entitled to summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those necessary to establish the elements of a party’s cause of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. Id. The

moving party has the burden of showing – “that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the movant satisfies this burden, then the non-movant must set forth specific, admissible facts that demonstrate the existence of a genuine issue of fact for trial. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 322-23. A party is entitled to summary judgment if the record as a whole could not lead a rational trier of fact to find in favor of the non-movant. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). Conversely, summary judgment is inappropriate if the evidence is sufficient for a reasonable fact-finder to return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248.

Even if there is no dispute as to the evidentiary facts, summary judgment is not appropriate where the ultimate factual conclusions to be drawn are in dispute. Overstreet v. Ky. Cent. Life Ins. Co., 950 F.2d 931, 937 (4th Cir. 1991). A court may not resolve disputed facts, weigh the evidence, or make determinations of credibility. Russell v. Microdyne Corp., 65 F.3d 1229, 1239 (4th Cir. 1995); Sosebee v. Murphy, 797 F.2d 179, 182 (4th Cir. 1986). The court accepts as true the evidence of the non-moving party and resolves all internal conflicts and inferences in the non-moving party’s favor. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” Scott v. Harris, 550 U.S. 372, 380 (2007). Furthermore, a party “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Therefore, “[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion.” Ennis v. Nat’l Ass’n of Bus. & Educ. Radio,

Inc., 53 F.3d 55, 62 (4th Cir. 1995). A plaintiff cannot use a response to a motion for summary judgment to correct deficiencies in a complaint challenged by a defendant's motion for summary judgment. See Cloaninger v. McDevitt, 555 F.3d 324, 336 (4th Cir. 2009) (noting that a plaintiff may not amend a complaint through argument in a brief opposing summary judgment); Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (same).

The Correctional and Medical Defendants argue that plaintiff did not exhaust administrative remedies for any of the claims. The Prison Litigation Reform Act provides that “[n]o action shall be brought with respect to prison conditions under [§ 1983] . . . , by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory and “applies to all inmate suits about prison life[.]” Porter v. Nussle, 534 U.S. 516, 524, 532 (2002). “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules.” Woodford v. Ngo, 548 U.S. 81, 90 (2006). When a prison provides an administrative grievance procedure, the inmate must file a grievance raising a particular claim and pursue it through all available levels of appeal to “properly exhaust.” Id.; Dixon v. Page, 291 F.3d 485, 490-91 (7th Cir. 2002).

“[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.” Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008). “[W]hen prison officials prevent inmates from using the administrative process . . . , the process that exists on paper becomes unavailable in reality.” Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006). An inmate’s failure to exhaust is an affirmative defense that a defendant has the burden to prove. Jones v. Bock, 549 U.S. 199, 216 (2007).

The Correctional and Medical Defendants rely on affidavits provided by C. Turner, the PCC Grievance Coordinator who has access to plaintiff's applicable grievance records. Turner avers that she reviewed plaintiff's grievance records and determined that plaintiff did not exhaust available administrative remedies as required by Virginia Department of Corrections ("VDOC") Department Operating Procedure ("DOP") 866.1, Inmate Grievance Procedure.¹²

DOP 866.1 is a mechanism for inmates to resolve complaints, appeal administrative decisions, and challenge policies and procedures. The process provides correctional administrators means to identify potential problems and, if necessary, correct those problems in a timely manner. All issues are grievable except issues about policies, procedures, and decisions of the Virginia Parole Board; disciplinary hearing penalties and/or procedural errors; state and federal court decisions, laws, and regulations; and other matters beyond the VDOC's control.

Inmates are oriented to the inmate grievance procedure when they enter the VDOC and when they are transferred to different facilities. Prior to submitting a grievance, the inmate must make a good faith effort to informally resolve the issue by submitting an informal complaint form, which is available in housing units. If not informally resolved, the inmate must file a regular grievance within thirty calendar days from the date of the occurrence or incident. Only one issue per grievance may be addressed. Regular grievances may receive three levels of

¹² Defendants rely upon the affidavit of a Grievance Coordinator, who describes DOP 866.1 and has access to plaintiff's grievance records. However, defendants did not docket a copy of the policy. DOP 866.1 provides that inmates, such as plaintiff, are informed of the available grievance procedures when they enter the VDOC and when transferred to a different VDOC facility. Plaintiff does not deny that he is familiar with VDOC grievance procedures, and plaintiff's grievances support the conclusion that plaintiff knows of DOP 866.1's requirements. Accordingly, I take judicial notice of DOP 866.1, which is available at <http://www.vadoc.state.va.us/about/procedures/documents/800/866-1.pdf> and was the policy in force during plaintiff's grievances. See Fed. R. Evid. 201(b)(2) (permitting judicial notice of facts which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Perry v. Johnson*, No. 3:10-cv-630, 2011 U.S. Dist. LEXIS 85431, 2011 WL 3359519 (E.D. Va. Aug. 3, 2011) (citing *Bowler v. Ray*, No. 7:07-cv-00565, 2007 U.S. Dist. LEXIS 88133, 2007 WL 4268915 (W.D. Va. Nov. 30, 2007)). Defendants are reminded to docket a copy of a VDOC policy when the policy is used to support a motion for summary judgment.

review. A facility's Warden or Superintendent conducts the first, "Level I" review of the grievance. If the inmate is unsatisfied with the determination, the inmate may appeal the determination to Level II, which is done by the Regional Ombudsman/Director. For most issues, Level II is the final level of review. For the few issues appealable to Level III, the Deputy Director or Director of the VDOC conducts the final review of the regular grievance.

Grievances that do not meet the filing requirements of DOP 866.1 are returned to the inmate within two working days from the date of receipt. The inmate is instructed how to remedy any problems with the grievance when feasible. A copy is made of all grievances and the original is returned to the inmate with reason for the return noted on the second page of the grievance form. If an inmate wishes a review of the intake decision for any grievance, the inmate may send the grievance to the Regional Ombudsman. There is no further review of the intake decision.

Turner avers that plaintiff filed 44 informal complaints between July 2011 and plaintiff's transfer on October 13, 2011. Turner notes that many of the informal complaints were repetitive, but plaintiff received a response to all 44 informal complaints. If plaintiff was not satisfied with a response to an informal grievance, DOP 866.1 permitted plaintiff to file a regular grievance about the same issue raised in the informal complaint. Plaintiff failed to file regular grievances for nearly all 44 informal complaints.

Plaintiff filed an informal complaint on July 23, 2011, claiming that Craig violated his rights by making him open his butt cheeks during a strip search. Sgt. Watts responded on August 6, 2011, stating that Craig correctly conducted the strip search. Plaintiff did not file a regular grievance about the strip search.

Plaintiff filed a regular grievance on August 10, 2011, complaining that Cumbee assaulted him and requesting that photographs be taken of the injuries. R. Walz responded to the grievance on August 11, 2011, informing plaintiff that the grievance was a request for services and did not meet the intake criteria for a regular grievance. Staff returned the rejected regular grievance to plaintiff, and plaintiff did not appeal Walz's intake decision.

Plaintiff filed a second regular grievance on September 23, 2011, claiming to be afraid of Cumbee and requesting that Cumbee be kept away from plaintiff. Turner rejected the regular grievance on the same day because it lacked sufficient information. Staff returned the rejected regular grievance to plaintiff, and plaintiff did not appeal Turner's intake decision.

Plaintiff filed a third regular grievance on September 25, 2011, demanding that Cumbee be disciplined for the alleged excessive force. Turner rejected the regular grievance on October 4, 2011, because plaintiff did not timely file it. Staff returned the rejected regular grievance to plaintiff, and plaintiff did not appeal Turner's intake decision.

Turner did not find any regular grievances about Cumbee's alleged excessive force, profanity, or racial epithets; Craig denying plaintiff a meal; staff mishandling plaintiff's mail; Scarberry's refusal to treat plaintiff; A. Mitchell interfering with treatment or access to a doctor; or Yates' improper hiring or training of staff. Turner concludes that plaintiff did not submit any "other regular grievances related to his complaints in this lawsuit or any other complaints during the time period of July 2011 through October 2011" and that plaintiff "clearly did not follow established procedures in his attempts to administratively resolve his complaints." (Turner Aff. (no. 19-1) ¶ 17.)

In a cross motion for summary judgment, plaintiff admits he "inartfully drafted" the August 10, 2011, informal complaint that Walz rejected as a request for services. Plaintiff

argues that Walz's response made the grievance procedure unavailable because Walz should have rejected the informal complaint for insufficient information. However, 866.1 allowed plaintiff to appeal Walz's intake decision to a regional ombudsman, a fact clearly described on the regular grievance returned to plaintiff. Plaintiff's decision to not appeal the intake decision does not make grievance procedures unavailable.

Plaintiff further argues that I should consider his excessive force claim exhausted because plaintiff wrote a letter about Cumbee to VDOC Director Harold Clarke, who, plaintiff alleges, forwarded the letter to VDOC Operations Director G. K. Washington. Plaintiff relies on Washington's letter, dated September 2, 2011, as support, which reads:

Thank you for your letter to the Department of Corrections Headquarters. The letter was forwarded to this office for a response. In your letter, you describe an assault on you by Officer Cumbee. You want an investigation into the aforementioned concern or a transfer.

You took the necessary actions by filing numerous informal complaints, which were received by Pocahontas [Correctional Center]. However, you failed to file any grievances. This gives the impression that the informals adequately addressed your concerns. Nonetheless, this office will review the circumstances further if they are received in the form of a Level II grievance appeal. You should give the facility the opportunity to address your complaint first. By using Operating Procedure 866.1, you can initiate an investigation yourself.

(Pl.'s Ex. 5 (no. 23-6) 1.) Plaintiff believes that the letter to Director Clarke, which plaintiff assumes Clarke read and forwarded to Washington, eliminates the need to file the necessary grievances per DOP 866.1.

Plaintiff's letter to Director Clarke does not constitute exhaustion. DOP 866.1 does not provide any exception to filing a regular grievance and receiving a Level I response from a warden or superintendent before contacting a VDOC deputy director or the VDOC Director. Washington explained that he could not assist plaintiff until plaintiff filed a regular grievance

and appealed the Level I response. Moreover, the VDOC Director conducts a Level III review of grievances involving only VDOC procedures, the Publication Review Committee, or Faith Review Committee. None of plaintiff's issues would qualify for Level III review by the VDOC Director.

Plaintiff relies on Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999), to argue that excessive force and medical deliberate indifference claims do not need to be exhausted.¹³ In Perez, the Seventh Circuit Court of Appeals created an exception to the exhaustion requirement for claims that could not be remedied by an administrative grievance. The Perez court explained:

It is possible to imagine cases in which the harm is done and no further administrative action could supply any "remedy." . . . Suppose the prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a "remedy," and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

182 F.3d at 538 (original emphasis). However, Booth v. Churner, 532 U.S. 731 (2001), overruled Perez's narrow view of administrative exhaustion by requiring "exhaustion of all administrative procedures that have 'authority to take some action in response to a complaint,' even if the procedure cannot provide the only relief that the prisoner is seeking, e.g., money damages." Larkin v. Galloway, 266 F.3d 718, 723 (7th Cir. 2001) (citing Booth, 532 U.S. at 736-38). The Seventh Circuit no longer recognizes the Perez exception, and I decline to apply the overruled exception to this case.

Plaintiff fails to refute defendants' evidence of his failures to exhaust administrative remedies for any of the claims raised in this action. Plaintiff further fails to establish that

¹³ Plaintiff also cites Brazelton v. Myatt, 1999 U.S. Dist. LEXIS 16521, 1999 WL 966435 (N.D. Ill. Oct. 19, 1999), which merely relied on Perez to hold that an Eighth Amendment medical claim did not need to be exhausted.

grievance procedures were unavailable, and plaintiff's decisions to not pursue administrative remedies preclude recovery in this action. Accordingly, the Correctional and Medical Defendants are entitled to summary judgment.

IV.

For the foregoing reasons, I join "Ms. Boyd, psychologist" as a defendant, dismiss all claims against Boyd and Anderson without prejudice for failing to state a claim upon which relief may be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1); grant the Correctional and Medical defendants' motions to dismiss and for summary judgment; and deny plaintiff's motion for summary judgment. I decline to exercise supplemental jurisdiction over any state-law claims, pursuant to 28 U.S.C. § 1367(c)(3).

The Clerk is directed to send copies of this Memorandum Opinion and the accompanying Order to plaintiff and counsel of record for defendants.

ENTER: This 23d day of May, 2012.


Senior United States District Judge



Operating Procedure

Effective Date December 1, 2010	Number 866.1
Amended 1/17/12	Operating Level Division
Supersedes Operating Procedure 866.1 (11/1/07)	
Authority COV §53.1-10, §8.01-243.2 BOC 6VAC15-31-180, 300	
ACA Standards 4-4284, 4-4344, 4-4394	
Office of Primary Responsibility Deputy Director of Operations	

Subject OFFENDER GRIEVANCE PROCEDURE	
Incarcerated Offender Access Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	FOIA Exempt Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Attachments Yes <input checked="" type="checkbox"/> #5 No <input type="checkbox"/>

I. PURPOSE

This operating procedure provides an administrative process for resolving offender issues and complaints through fair, prompt decisions and actions in response to complaints and grievances from offenders incarcerated in Department of Corrections, Division of Operations facilities.

II. COMPLIANCE

This operating procedure applies to all units operated by the Department of Corrections (DOC). Practices and procedures shall comply with applicable State and Federal laws, Board of Corrections policies and regulations, ACA standards, and DOC directives and operating procedures.

III. DEFINITIONS

Abuse – The use of these procedures in a manner other than in good faith for resolution of grievances

Appeal – The submission of a response to a grievance from the lower level to the next available level detailing the reason(s) the grievant is not satisfied with the lower level response or remedy provided.

Calendar Day – Any 24-hour day regardless of weekends or state holidays

Day – A 24-hour period

Emergency – A situation or condition which may subject the offender to immediate risk of serious personal injury or irreparable harm

Founded – When a determination has been made that a remedy is required

Grievance – An unresolved issue filed and signed by an individual offender on his/her own behalf concerning an issue which has affected him/her personally and meets intake criteria

Grievance Coordinator – The employee designated for coordination and monitoring of the facility's offender grievance procedure at facilities that do not have an established Human Rights Advocate position

Informal Procedure – Those processes, practices, or procedures available to offenders to secure facility services or resolve complaints

Institutional Ombudsman – The working title of the Human Rights Advocate position designated for the coordination and monitoring of the facility's Grievance Procedure.

Misuse – Using the grievance procedure other than in accordance with the procedures defined herein

Regional Ombudsman – The working title for the Human Rights Advocate Senior employed by the Office of Ombudsman Services responsible for monitoring facility grievance procedures, and providing investigative services for offender grievance appeals

Repetitive Grievance – An issue that has been previously grieved through the regular grievance procedure

Reprisal – Any action or threat of action against anyone for good faith use of or good faith participation in the grievance procedure

Remedies – Actions taken as result of founded grievances

Threatening Language – Language written within a grievance expressing the intent to physically injure or kill another person

Unfounded – When a determination is made of compliance with properly established procedures

Vulgar, Insolent Language – The use of language that is offensive to a reasonable person

Working Day – Weekdays, Monday through Friday, except official state holidays

IV. GENERAL

A. Facility Compliance with this Operating Procedure

1. Each facility will prepare an Implementation Memorandum in accordance with Operating Procedure 001.1, *Operating Procedure Development*, which will provide facility-specific information designating staff responsibilities and facility processes under this operating procedure.
2. This Operating Procedure and the facility's Implementation Memorandum will be known as the Offender Grievance Procedure.
3. All attached forms associated with this operating procedure will be used as designed and shall not be customized by facilities.
4. Each facility shall notify each offender upon arrival and during orientation how to access the Offender Grievance Procedure including sources of *Informal Complaint*, *Emergency Grievance*, and *Grievance* forms and directions for submitting each document. (4-4344)

B. Provision for Institutional Ombudsman/Grievance Coordinator

1. Each facility will have an Institutional Ombudsman/Grievance Coordinator and a designated alternate to ensure procedural compliance in the absence of the Institutional Ombudsman/ Grievance Coordinator. An Institutional Hearings Officer should not serve as an alternate Institutional Ombudsman; exceptions must be specially approved by the Deputy Director of Operations.
2. The Institutional Ombudsman/Grievance Coordinator and designated alternate should complete any training requirements set by the Deputy Director of the Division of Operations.
3. The Institutional Ombudsman/Grievance Coordinator will be responsible for monitoring for compliance, coordination of the day-to-day operation, conducting investigations of grievances, and preparing proposed responses as needed.
4. The Institutional Ombudsman/Grievance Coordinator will arrange a method of communication with other facility departments (e.g., Personal Property, Mailroom) so that information about pending grievances can be shared prior to making final disposition.

C. Communication of Procedures

1. All employees and offenders in Division of Operations facilities shall be advised of the Offender Grievance Procedure, which shall be available for review in locations accessible to both employees and offenders. (4-4284)
2. Initial Notification at Reception Centers/Parole Violators Unit
 - a. The standardized initial *Offender Grievance Procedure Notification* (see Attachment 1) should be

given to each offender during orientation at all reception centers and all parole violator units. Offenders with special needs (i.e., visually or hearing impaired, non-English speaking, non-readers) should be identified and the Institutional Ombudsman/Grievance Coordinator notified of the special need so that necessary services can be obtained prior to the facility's formal orientation.

- b. If an offender wishes to file a grievance prior to participation in the formal orientation, provisions should be made for staff to provide assistance so that the offender's ability to grieve an issue is in no way hindered.
3. Facility Operation - An explanation of the facility's offender grievance procedure should be provided to all new employees and incoming offenders during orientation. Provisions should be made prior to orientation for those offenders not speaking English, as well as for the impaired, handicapped, and non-readers.
4. The Institutional Ombudsman/Grievance Coordinator will monitor to ensure that appropriate information on the offender grievance procedure is provided.

D. Accessibility

1. Each offender will be entitled to use the grievance procedure.
2. When an offender is adjudged by the Facility Unit Head as abusing that usage, his/her filings may be limited in accordance with the *Limiting as a Result of Abuse* Section of this operating procedure.
3. In the event of a widespread facility disruption, natural disaster, or other unusual occurrence which requires emergency action, any or all portions of the Offender Grievance Procedure may be temporarily suspended. Once order has been restored, the processing of grievances will resume. The Facility Unit Head shall make the emergency determination in accordance with procedures governing facility emergencies.

E. Reprisals

1. Offenders shall not suffer reprisals for filing grievances in good faith. Neither employees nor offenders participating in the resolution of grievances should be subject to reprisal in any form.
2. An offender may pursue a complaint of reprisal through the Offender Grievance Procedure.
3. Allegations by employees of reprisals should be reported through their chain-of-command.

F. Written Responses with Reasons

1. At each level of the procedure, responses to each grievance will be made in writing, with reasons for the decision stated clearly.
2. Employees who are the subject of the issue being grieved will not be the respondent to a grievance, but may offer information during the investigation of the complaint.
3. Employees who are the subject of the issue may respond to an *Informal Complaint*.

G. Appeals

1. Administrators or employees of the facility shall not interfere with an offender's right to submit appeals.
2. An offender who is dissatisfied with the response to a grievance may appeal by signing, dating, and indicating in the designated area reasons why he/she is dissatisfied with the prior response.
3. Any issue not addressed in the original grievance complaint will not be considered in an appeal.
4. Appeals not submitted in accordance with procedures should be returned to the offender with

specific reasons for the return.

H. Time Limits

Prompt and reasonable time limits will be set for all levels of the procedure with provisions for emergencies.

I. Disciplinary Action

1. Offenders are instructed to use the grievance process in good faith for problem resolution. An offender's use of the grievance procedure should not ordinarily be cause to take disciplinary measures.
2. In *Informal Complaints* or grievances where offenders threaten bodily harm to any person (Offense Code 212) or use vulgar or insolent language toward an employee (Offense Code 222), a charge may be issued in accordance with Operating Procedure 861.1, *Offender Discipline, Division of Operations*.
3. Offenders will not be charged with any other offenses under Operating Procedure 861.1, *Offender Discipline, Division of Operations*, for use of the grievance procedure.

J. Limiting as a Result of Abuse

1. It is imperative that all offenders be able to utilize their available administrative remedies in a timely manner. All offenders should use the grievance procedure in good faith for problem resolution.
2. Offenders who abuse the grievance procedure by excessive filings or habitual misuse of the procedure hinder other offenders' access and impede staff's ability to investigate and resolve complaints within specified time limits.
3. Where an offender is adjudged to be abusing the offender grievance process, it is the responsibility of the Facility Unit Head to regulate that offender's usage of the informal process and of the regular and emergency grievance procedures.
 - a. On a case-by-case basis, the Facility Unit Head should review the offender's usage of the informal process and the grievance procedure and determine whether restriction of informal, regular, and/or emergency filings is needed.
 - b. A face to face interview should be conducted prior to initially placing an offender on a limitation status.
4. An offender may be restricted to no less than one informal complaint and one grievance per week. The Facility Unit Head will notify the offender in writing of the reason for the limitation, the number of informal complaints and grievances he/she is limited to, and the period of the limitation. Limitations shall not exceed 90 days (per occurrence). A copy of the notice will be provided to the Regional Administrator ~~Director~~.
5. Any informal complaint, regular, or emergency grievance submitted in excess of the limitation will be returned to the offender without a response.
6. The offender may grieve the limitation decision to the Facility Unit Head using the limitation notice as the informal resolution attempt. The offender may appeal application of the limiting procedure to the Regional Administrator ~~Director~~ at Level II.
7. If an offender transfers to another DOC facility while on limitation, the limitation shall continue until the scheduled expiration date. The Institutional Ombudsman/Grievance Coordinator should inform the new facility that the offender is under limitation.

K. Withdrawal of Grievances by Offender

1. An offender may voluntarily withdraw a complaint or grievance at any time, from any level of the procedure by completing the *Withdrawal* section on the *Informal Complaint* (see Attachment 3) or *Regular Grievance* (see Attachment 2 page 2).
2. No other withdrawal forms may be created.
3. Subsequent complaints/grievances on the same issue should be determined as repetitive and should not normally be accepted if the offender has formally withdrawn the initial complaint or grievance.

L. Grievability

1. Grievable - The following matters are grievable by offenders:
 - a. Procedures of the facility, region, division, and department **which affect the grievant personally**
 - b. Actions of individual employees and/or offenders **which affect the grievant personally**, including any denial of access to the grievance procedure
 - c. Reprisals against the grievant for filing a grievance or grievance appeal
 - d. Issues concerning the DOC's administration of the Interstate Compact Agreement **which affect the grievant personally**
 - e. Any other matters relating to conditions of care or supervision within the authority of the DOC which affect the grievant personally
2. Non-Grievable - The following matters are not grievable.
 - a. Disciplinary hearing decisions, penalties and/or procedural errors, which may be appealed in accordance with Operating Procedure 861.1, *Offender Discipline, Division of Operations*
 - b. State and Federal court decisions, laws, and regulations
 - c. Policies, procedures, and decisions of the Parole Board, Board of Corrections, Virginia Department of Transportation (VDOT), the Department of Correctional Education (DCE), and other agencies
 - d. Other matters beyond the control of the DOC

M. Remedies

The grievance procedure should afford a successful grievant a meaningful remedy when applicable. Although available remedies may vary among facilities, a reasonable range of meaningful remedies in each facility is necessary. All grievances determined as founded will be provided an administrative remedy and should, if necessary, include an offender remedy. Remedies should include, but are not limited to, the following:

1. Administrative Remedies
 - a. Substance of procedure: Written change communicated effectively, promptly, as extensively as necessary, and with instructions including time limits for effecting the change.
 - b. Interpretation of procedure: Written explanation of revised interpretation communicated effectively, promptly, as extensively as necessary, and with instructions for effecting the change.
 - c. Application of procedure: Written direction to the relevant employee or employees to apply the procedure correctly, and, if necessary, with instructions for accomplishing the change. Disciplinary actions against employees, if appropriate, will not be communicated to the offender, but should be documented.

2. Individual Offender Remedies

Redress to the grievant as appropriate (protection of the grievant, return or reimbursement of

property, appropriate, prompt classification action, re-computation of time, timely medical attention or treatment, improvement of living conditions, etc.). The redress should be made in a timely manner.

V. INFORMAL COMPLAINT PROCEDURE

- A. Prior to submitting a formal grievance, the offender should demonstrate that he/she has made a good faith effort to resolve the issue informally.
1. This good faith effort shall be documented using an *Informal Complaint* (see Attachment 3 for a sample), except where operating procedures specifically state that other documentation may be used for the informal process, such as for classification hearings, disapproved correspondence/publications, or confiscated property.
 2. The offender is responsible for submitting the *Informal Complaint* in a timely manner to allow time for staff response within the time period allowed to file a *Grievance*. If 15 calendar days have expired from the date the *Informal Complaint* was logged without the offender receiving a response, the offender may submit a *Grievance* on the issue and attach the *Informal Complaint* receipt as documentation of the attempt to resolve the issue informally.
 3. Upon facility staff review, each *Informal Complaint* will be logged in VACORIS and the receipt returned to the offender.
 4. The facility Implementation Memorandum should specify the following:
 - a. Where offenders can obtain *Informal Complaint* forms
 - b. How and where to submit an *Informal Complaint*
 - c. Staff position(s) designated to log *Informal Complaints*
 - d. The staff positions responsible for responding to *Informal Complaints*
 - e. The time period allowed for staff responses.
- B. The time frame for staff response to an offender's informal complaint shall be no longer than 15 calendar days to ensure responses are provided prior to the expiration of the 30-day time requirement for an offender to file his/her grievance.
- C. Informal complaints must be addressed at the facility level and may not be referred to departments outside the facility. Facility staff may contact various departmental staff to ascertain information to respond to the complaint if necessary.
- D. Responses will be made in writing with reasons for the response stated clearly. The *Informal Complaint* response should be returned to the office that logged it and the response forwarded to the offender.
- E. An offender may withdraw an *Informal Complaint* at any time by completing the *Withdrawal* section with a staff witness and submitting it to the person designated to log *Informal Complaints*. Once an *Informal Complaint* is withdrawn, the offender will not receive a response nor may the offender submit a *Grievance* or another *Informal Complaint* on the same issue.

VI. REGULAR GRIEVANCE PROCEDURE

A. Initiation of Regular Grievance

1. Grievances are to be submitted within 30 calendar days from the date of occurrence/incident or discovery of the occurrence/incident, except in instances: 1) beyond the offender's control, or 2) where a more restrictive time frame has been established in Operating Procedures to prevent loss of remedy or the issue from becoming moot. Once a grievance is submitted, all records necessary to address the complaint should be made available to the designated person conducting the

investigation.

2. Offenders are to use the *Regular Grievance* (see Attachment 2) to submit their own grievances. *Regular Grievances* should be available to all offenders during waking hours. Assistance should be made available for offenders who are unable to complete the forms.
 - a. Only one issue per grievance form will be addressed. The offender is to write the issue in the space provided on the *Regular Grievance*, preferably in ink. The offender must attach any required documentation (*Informal Complaint, Notification of Confiscation of Property, Notice of Unauthorized Correspondence, Notification of Publication Disapproval*, ICA documents and/or other appropriate documents), of his/her attempt to informally resolve the issue.
 - b. The original *Regular Grievance* (no photocopies or carbon copies) should be submitted by the offender through the facility mail system to the Facility Unit Head's Office for processing by the Institutional Ombudsman/Grievance Coordinator. If the offender has been transferred, the offender should submit the informal complaint and subsequent grievance to the facility where the issue originated.
 - c. Grievances repetitive of a complaint previously filed through the regular grievance procedure or which contain threatening or vulgar language will not be accepted.

B. Intake

1. Incoming grievances are to be dated/date stamped on the working day received in the space provided on Page 1 of the *Regular Grievance* (see Attachment 2).
2. If the grievance meets the criteria for acceptance, the grievance should be logged into VACORIS using the working day received. A *Grievance Receipt* will be issued within two working days from the date of receipt.
3. If the grievance does not meet the criteria for acceptance, the grievance should be returned to the offender within two working days from date received by completing the *Intake* section of the *Regular Grievance* (see Attachment 2, page 2) on the back of the *Regular Grievance*. A copy of all returned grievances shall be maintained for documentation purposes in the offender's individual grievance file.
4. If an offender wishes a review of the intake decision on any grievance, he/she may send the *Regular Grievance* form within five calendar days of receipt to the appropriate Regional Ombudsman for a determination. There is no further review of intake decisions.
5. In the event of abusive filings or misuse by an offender, the Institutional Ombudsman/Grievance Coordinator should contact the Facility Unit Head for a determination if the limiting procedure should be instituted prior to initiating any intake action. If the Facility Unit Head decides to limit the offender, all filings in question will be returned to the offender with the written notification from the Facility Unit Head of the initiation of the limiting procedure in accordance with the *Limiting as a Result of Abuse* Section of this operating procedure.
6. Special Concerns during the Intake Process
 - a. Allegations of Physical Assault or Criminal Activity
 - i. Grievances alleging physical assault or criminal activity by employees or offenders should be brought to the attention of the Facility Unit Head when received.
 - ii. The grievance should be logged and receipted according to the intake criteria and time limits.
 - b. Disciplinary Action
 - i. If a grievance is received which threatens harm to any person or contains vulgar and/or insolent language toward an employee, the offender may be charged under Operating Procedure 861.1, *Offender Discipline, Division of Operations*.

- ii. The original grievance is forwarded to designated staff for review and possible disciplinary charge.
- iii. The offender is to be advised of this action by a copy of the *Regular Grievance* and referral notice on the back of the *Regular Grievance* form.

C. Levels of Review

There are three possible levels of review available for regular grievances. Each level of response should state if an appeal is available and provide the title and address of the respondent for the next available level of review, if applicable.

1. Level I, Facility Unit Head

- a. The Facility Unit Head maintains the primary responsibility for providing responses to grievances at this level within the time limits specified. The Facility Unit Head may delegate authority to provide Level I responses to the Assistant Facility Unit Head.
- b. Once the grievance is logged and receipted, the Institutional Ombudsman/Grievance Coordinator should review the content and determine the course of investigation. A face-to-face interview with offenders is not required for all Level I investigations. A face-to-face interview should not be held on issues that have been resolved.
- c. The response will include the following:
 - The results of the informal process
 - The facts (who, what, where, why)
 - The procedure and content which govern the issue
 - A determination of one of the following:
 - Whether the complaint was founded or unfounded and, if founded, what remedy was taken, or will be taken within what time limit
 - Whether the procedure being challenged needs revision
 - The reason for the determination
 - Instructions on the appeal process
- d. The Facility Unit Head or designee should ensure that an appropriate investigation has occurred and any required remedy action has been taken, or will be taken within a specified time limit, prior to issuing the Level I response.

2. Level II - Regional Administrator Director, Health Services Director, or Chief of Operations for Offender Management Services

- a. Grievance issues which the Regional Administrator Director has authority over are forwarded to the appropriate Regional Office for a response.
- b. Grievances regarding actions or decisions of Offender Management Services (including Central Classification Services decisions, time computation, Court and Legal actions, detainees, etc.) are reviewed and responded to by the Chief of Operations, Office of Offender Management Services.
- c. Grievances regarding Health Services procedures and issues of medical, dental, and mental health care are reviewed and responded to by the Director of the Health Services Unit. (4-4394)
- d. If the Level I response does not contain sufficient information to arrive at a decision at Level II, the Level II respondent or designee should request the information from the Facility Unit Head or designee who will ensure that the information is provided within the time frame established by Level II.
- e. If the review at Level II supports the Level I response, the response should indicate such. If the Level I response is not supported, the response will indicate the results of any additional investigation and any action to be taken within a specified time period.

- f. The response at this level should indicate whether the issue qualifies for an appeal to the next level, and provide the name and address of respondent at the next level of appeal, if applicable. If there is no further appeal, the offender should be advised that he/she has exhausted all administrative remedies.

3. Level III, Deputy Director or Director

- a. Grievances challenging the substance or interpretation of any DOC Procedures are appealable to the respective Deputy Director.
- b. Grievances regarding decisions of the Publication Review Committee are appealable to the Deputy Director of Operations directly from Level I.
- c. Grievances regarding decisions of the Faith Review Committee are appealable to the Deputy Director of Operations directly from Level I.
- d. Grievances appealed to the Deputy Director or Director's Office will be reviewed to determine if they qualify for a response by this level. Grievances, which do not qualify, will be returned to the offender indicating such. Grievances, which qualify for a Level III decision, will be responded to by either the Deputy Director or the Director, as appropriate. The offender will be advised that this is the last level of appeal and that he/she has exhausted all administrative remedies.

4. Those grievances concerning the Interstate Compact Agreement from Virginia offenders housed in states participating in the Agreement are to be submitted to the Manager of Central Classification Services in the Office of Offender Management Services for a Level I response. These grievances may be appealed to the Chief of Operations, Office of Offender Management Services for a Level II response. These grievances are not appealable to Level III.

D. Time Limits

1. The total time allowed from initial submission of the regular grievance to the last level of review will not exceed one hundred and eighty calendar days, including any authorized continuances.
2. Responses - Responses should be made within specified time limits at each level of decision. Expedient processing of grievances at each level of decision is essential to prevent grievances from becoming moot. Time limits will be considered as beginning on the day the grievance is received at each level. The grievance form will indicate the date the response is signed. The time between the date received and mailed to the offender should not exceed the time allotted for each level.
3. Specified Time Limits - Time limits for responses at each level for regular grievances are as follows:
 - Level I 30 calendar days
 - Level II 20 calendar days
 - Level III 20 calendar days
4. Authorized Continuances - A regular grievance may be continued up to 30 calendar days beyond the specified time limits at any level of the procedure for good reason(s). The offender must be notified in writing of the continuance prior to the expiration of the specified time limit at any level. Grievances should be completed as soon as the reason justifying the continuance has ended or is no longer applicable. Continuances must be printed from VACORIS. Authorized continuances may be justified for the following reasons:
 - The principal(s) involved is unavailable to provide the information essential to the issue being grieved
 - Awaiting results of Special Investigation Unit or information from other facilities, divisions, or agencies
 - Unavailability of key staff due to escape, disturbance, or natural disasters
5. Expiration of a time limit (to include any authorized continuance) at any stage of the process shall qualify the grievance for appeal to the next level of review. The grievance will be returned promptly

to the offender. The respondent will advise the offender on the grievance form of the option to advance the grievance and the appeal information (name/ address for the next level of review).

6. The offender should be allowed 5 calendar days upon receipt of a response to appeal to the next level, if such appeal is available.

E. Distribution and Recordkeeping

1. The original grievance with response(s) should be returned to the offender and a copy of the grievance with responses from all appeals routed to the Institutional Ombudsman/Grievance Coordinator for filing in the offender's grievance folder.
2. The facility maintains the official record of the offender grievance with copies of each level's response.

VII. EMERGENCY GRIEVANCES

- A. Special provisions are made for responding to situations or conditions which may subject the offender to immediate risk of serious personal injury or irreparable harm. It is the duty of all corrections employees to be responsive to emergency grievances.
- B. The facility's implementation memorandum and offender orientation handbook shall indicate how offenders can obtain and submit *Emergency Grievances*. The facility's implementation memorandum shall provide instructions for proper handling of *Emergency Grievances* including designation of staff persons responsible for receiving and responding to *Emergency Grievances*.
- C. Initiation - *Emergency Grievance* forms should be available on a 24-hour basis for all offenders regardless of housing status. Offenders are to write their grievances on the pre-printed multipart *Emergency Grievance* form (Attachment 5 is provided as a sample) and submit the completed *Emergency Grievance* to a staff person. Use of threatening, vulgar or insolent language, or false allegations against staff, may subject the offender to disciplinary charges as outlined in the *Disciplinary Action* Section of this operating procedure.

D. Intake

1. The staff person who received the *Emergency Grievance* will determine what action needs to be taken in accordance with specific instructions in the implementation memorandum.
2. If the *Emergency Grievance* must leave the presence of the offender, the receipt at the bottom of the *Emergency Grievance* form should be completed by the staff person and provided to the offender when the offender submits the *Emergency Grievance*. If a determination is made and the form is completed in the offender's presence, the receipt section of the form should be struck through and the "File" copy retained prior to returning the *Emergency Grievance* form to the offender.

E. Response

1. The implementation memorandum will designate who may serve as respondents to *Emergency Grievances*. The respondent should review the issue, determine the course of action, and provide an appropriate response with reasons.
2. If the issue does not subject the offender to immediate risk of serious personal injury or irreparable harm, it is so indicated on the *Emergency Grievance*, signed with date and time of response by the designated staff person.
3. If the issue subjects the offender to immediate risk of serious personal injury or irreparable harm, the designated staff person should determine if he/she can address the issue or if the *Emergency Grievance* should be forwarded to a higher authority for resolution. The *Emergency Grievance* should receive response from the level at which corrective action can be taken.

4. If an offender receives a medical or dental assessment based on an *Emergency Grievance* and the Health Care staff determines that the condition is clearly not an emergency, the offender will be subject to medical co-pay charges in accordance with Operating Procedure 720.4, *Co-payment for Health Care Services*.

F. Time limits - An *Emergency Grievance* should be responded to within eight hours. An *Emergency Grievance* that will be mooted by the passage of the time limit should receive immediate attention with appropriate action taken.

G. Distribution and Recordkeeping

1. The original *Emergency Grievance* form with response goes to the offender and the copy is routed to the Institutional Ombudsman/Grievance Coordinator for retention.
2. Those grievances, which are determined to be emergencies, are logged into VACORIS within two working days of response.
3. Those grievances, which do not meet the definition for an emergency, are not logged.
4. Copies of all *Emergency Grievance* forms submitted by an offender should be filed in the offender's grievance record for documentation.

H. Monitoring - The Institutional Ombudsman/Grievance Coordinator should review the copies of *Emergency Grievance* and bring problem areas (including any allegations of criminal activity or physical assault) to the attention of the Facility Unit Head.

VIII. RECORDS

A. The Institutional Ombudsman/Grievance Coordinator will maintain records of all regular and emergency grievances submitted at the facility, both logged and un-logged.

1. VACORIS contains the official information of all logged grievances at each level of review.
2. The Institutional Ombudsman/Grievance Coordinator should maintain monthly data regarding the number/reason for returns of regular grievances during the intake process, and the number of grievances submitted through the emergency process that were determined not to be emergencies. This information should be included in the written monthly report (see the *Monitoring and Evaluation* Section of this operating procedure.).

B. Retention - Copies of grievances, both regular and emergency, will be maintained at the unit for a minimum of three years following final disposition of the grievance. Grievances concerning matters known to be under investigation or litigation will be maintained until completion of the investigation or litigation if that event exceeds the 3-year timeframe.

C. Disposal of Records - Permission for disposal of grievance records must be secured in accordance with Operating Procedure 055.1, *Public Records Retention and Disposition*.

D. Record Content - The facility maintains the official copy of any grievance. Grievances or copies of grievances will not be placed in an offender's Central or Institutional files, except when the grievance has been used as evidence to substantiate a disciplinary action taken in accordance with the *Disciplinary Action* Section of this operating procedure.

E. Confidentiality - Grievance records will be maintained in accordance with Operating Procedure 050.1, *Incarcerated Offender Records Management*. Information on grievances should only be available to employees on a need-to-know basis, as determined by the Facility Unit Head.

IX. MONITORING AND EVALUATION

A. The Offender Grievance Procedure will be monitored by the Institutional Ombudsman/Grievance

Coordinator at the facility level and by the Ombudsman Services Unit at the regional and central office levels on a regular basis.

B. The Institutional Ombudsman/Grievance Coordinator will regularly monitor the facility grievance procedure for compliance with this Operating Procedure and the facility's Implementation Memorandum.

1. As part of this monitoring process, the Institutional Ombudsman/Grievance Coordinator will provide to the Facility Unit Head a *Monthly Report* (see Attachment 4) regarding the operation of the grievance procedure for the previous month.

2. A copy of the *Monthly Report* is to be sent to the Regional Ombudsman for monitoring purposes.

C. The Offender Grievance Procedure will be monitored by the Ombudsman Services Unit through facility visits, review of the Institutional Ombudsman/Grievance Coordinator's *Monthly Report*, and the usage of information contained in VACORIS.

D. An evaluation of the Offender Grievance Procedure will be conducted as needed by the Ombudsman Services Unit and/or at the direction of the Deputy Director of Operations to ascertain the effectiveness of the process statewide and any need for revision to this procedure.

X. REFERENCES

Operating Procedure 001.1, *Operating Procedure Development*

Operating Procedure 050.1, *Incarcerated Offender Records Management*

Operating Procedure 055.1, *Public Records Retention and Disposition*

Operating Procedure 720.4, *Co-payment for Health Care Services*

Operating Procedure 861.1, *Offender Discipline, Division of Operations*

Federal Prison Litigation Reform Act (PLRA)

Federal Civil Rights of Institutionalized Persons Act (CRIPA)

XI. REVIEW DATE

The office of primary responsibility shall review this operating procedure annually and re-write it no later than December 1, 2013.

The office of primary responsibility reviewed this operating procedure in December 2011 and necessary changes are being drafted.

Signature Copy on File

John M. Jabe, Deputy Director of Operations